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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ARCADIO S. ACUNA,

Plaintiff,

v.

LEA ANN CHRONES, et al.,

Defendants.

C 07-5423 VRW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff Arcadio Acuna's (Plaintiff) Complaint should be dismissed because (1) all the claims are barred by the doctrines of res judicata and collateral estoppel, (2) Plaintiff failed to establish supervisor liability under 42 U.S.C. § 1983, (3) there is no constitutional right to an administrative-appeals process, and (4) Plaintiff failed to properly exhaust his administrative remedies for his retaliation claim. Moreover, Defendants are entitled to qualified immunity for the actions alleged in the Complaint. Therefore, Defendants respectfully request Plaintiff's Complaint be dismissed.

STATEMENT OF ISSUES

1. The doctrines of res judicata and collateral estoppel prohibit a party from asserting the same claims or issues in multiple lawsuits. Plaintiff presented the claims and issues contained in the Complaint on two separate occasions to the Superior Court of California, County of Del Norte. Is the Complaint barred by res judicata and collateral estoppel?

2. A supervisor is not liable under 42 U.S.C. § 1983 for the actions of his or her subordinates unless the supervisor participated in or directed the violations or knew of the violations and failed to prevent them. The Complaint names as defendants several high level California Department of Correction and Rehabilitation officials but does not allege that these officials participated in or directed the violations of Plaintiff's constitution rights or knew of the violations and failed to prevent them. Must these supervisory defendants be dismissed because the Complaint fails to state a claim upon which relief can be granted?

3. A prison official's involvement and actions in reviewing and/or investigating a inmate's administrative appeal cannot ordinarily serve as the basis for liability under 42 U.S.C. § 1983. The Complaint seeks to impose liability on various defendants for their actions reviewing and/or investigating the inmate appeals submitted by Plaintiff. Must these defendants be dismissed because the Complaint fails to state a claim upon which relief can be granted?

4. The Prison Litigation Reform Act requires inmates to exhaust their administrative remedies before filing a lawsuit. Plaintiff did not exhaust his administrative remedies with respect to his claim for retaliation. Must Plaintiff's claim for retaliation be dismissed?

STATEMENT OF THE CASE

On October 24, 2007, Plaintiff, a state prisoner, filed a 42 U.S.C. § 1983 civil rights complaint (Complaint) in the U.S. District Court for the Northern District of California. In the Complaint, Plaintiff alleges that Defendants Woodford, Alameida, Kirkland, Chrones, Williams, Grannis, Fischer, Hawkes, Ruff, Hunter, Garcilazo, and Luper (Defendants) violated various federal and state laws. This Court screened the Complaint under 28 U.S.C. § 1915A and found that Plaintiff stated cognizable claims for alleged due process violations and retaliation against Defendants. (Order of Service 3:19-25.) Defendants now submit this motion to dismiss Plaintiff's action under Rule 12(b)(6) and the unenumerated portion of Rule 12(b).

FACTUAL BACKGROUND

I. THE PARTIES.

Plaintiff is an inmate currently housed in the security housing unit (SHU) at Pelican Bay State Prison (PBSP). (Compl. ¶ 15.) Plaintiff is serving a triple-life sentence, plus eight years. (*Id.* ¶ 16.) In 1990, Plaintiff was validated as an associate of a prison gang and was placed in PBSP's SHU. (*Id.*) Plaintiff was released from the SHU to the general prison population in 2000. (*Id.*) After being re-validated as an associate of a prison gang, Plaintiff was removed from the general prison population on March 5, 2004. (*Id.* ¶ 21.)

Plaintiff alleges that Defendants Woodford, Alameida, and Chrones were at various times the Director of the California Department of Corrections and Rehabilitation (CDCR). (*Id.* ¶¶ 1-3.) Plaintiff does not allege these defendants took any particular action against him but that they are only "legally responsible for the overall operation of the Department (*i.e.* CDCR) and each institution under its jurisdiction." (*Id.*)

Plaintiff alleges that Defendants Kirkland and Hunter are the former acting wardens for PBSP and California State Prison, Lancaster (CSP-LAC). (*Id.* ¶¶ 6, 8.) Plaintiff alleges that these defendants are "legally responsible for the operations of PBSP [and CSP-LAC] and the welfare of all the inmates in that prison." (*Id.*) Moreover, Plaintiff alleges that these defendants "denied the institutional appeal challenging Plaintiff's illegal placement and retention in the SHU at the second level of review." (*Id.*)

Plaintiff alleges that Defendant Grannis is the Chief of the Inmate Appeal Branch for CDCR. (*Id.* ¶ 7.) Plaintiff alleges that this defendant "denied the institutional appeals challenging plaintiff's illegal placement and retention in the SHU . . . ." (*Id.*)

Plaintiff alleges that Defendant Garcilazo is a correctional officer at CSP-LAC. (*Id.* ¶ 4.) Plaintiff alleges that this defendant "falsely accused Plaintiff of being a member of a prison gang when Plaintiff refused to become an informant." (*Id.*)

Plaintiff alleges that Defendant Luper is a correctional officer with CDCR. (*Id.* ¶¶ 5, 21.) Plaintiff alleges that this defendant was involved in the initial decision to re-validate Plaintiff as an active member of a prison gang in 2004. (*Id.*)

Plaintiff alleges that Defendants Hawkes, Williams, Fischer, and Ruff are correctional officers with CDCR. (*Id.* ¶¶ 9-12, 28-29.) Plaintiff alleges that these defendants were involved in the decision to re-validate Plaintiff as an active member of a prison gang in 2006. (*Id.*)

II. A SUMMARY OF THE ALLEGATIONS IN THE COMPLAINT.

The gravamen of the Complaint relates to Plaintiff being re-validated as an associate of the Mexican Mafia ("EME") prison gang on two occasions. The first re-validation took place in 2004, while the second re-validation took place in 2006. After each re-validation, Plaintiff submitted an inmate appeal and filed a petition for the writ of habeas corpus with the Superior Court of California, County of Del Norte (Superior Court).

A. The 2004 Prison Gang Re-Validation.

Plaintiff alleges that on December 2003, Defendant Garcilazo approached him and stated that "unless Plaintiff agreed to become an informant [that] he [*i.e.* Defendant Garcilazo] was going to find a way to send Plaintiff back to PBSP SHU." (*Id.* ¶ 19.) Plaintiff contends that he refused this request, which prompted Defendant Garcilazo to start the process to re-validate Plaintiff as an associate of the EME. (*Id.*) Plaintiff contends that on January 20, 2004, Defendant Luper re-validated Plaintiff as an associate of the EME. (*Id.* ¶ 21.)

1. Inmate Appeal No. CAL 04-00545.

Plaintiff apparently believed that this 2004 gang re-validation violated his due process rights. On March 11, 2004, Plaintiff submitted inmate appeal no. CAL 04-00545. (Compl. Ex.

F.) In this inmate appeal, Plaintiff grieved that his "due process rights were violated in a number of ways by the validation process." (*Id.*) Specifically, Plaintiff grieved that he was not provided with certain disclosure forms, that evidence used in the validation process did not conform with California law, and that Plaintiff disputed some of the evidence utilized in the re-validation process. (*Id.*)

This inmate appeal bypassed both the informal and first level of review. At the second level, Plaintiff's inmate appeal was denied. (*Id.*) Plaintiff continued to prosecute this inmate appeal to the Director's Level contending that the "validation process was a gross denial of due process." (*Id.*) At the Director's Level, Plaintiff's inmate appeal was denied. (*Id.*)

2. Superior Court Case No. HCPB 05-5242.

On October 6, 2005, Plaintiff filed a petition for the writ of habeas corpus against Defendant Kirkland in the Superior Court. (Req. for Judicial Not. (RJN) Ex. 1.) Plaintiff's petition was assigned the case no. HCPB 05-5242. (*Id.*) Plaintiff's petition recited in detail the factual background surrounding the 2004 gang re-validation. (*Id.*) In the petition, Plaintiff alleged that the 2004 gang re-validation violated his due process rights, that the gang re-validation was not supported by the evidence, and that the periodic reviews of Plaintiff's placement in the SHU were a "meaningless gesture." (*Id.*, at 3-5, 8-9, 14-15.)

The Superior Court requested the parties submit briefing on Plaintiff's petition. (*Id.* Ex. 2.) The respondent submitted a detailed response disputing the allegations in Plaintiff's petition and requested the petition be denied. (*Id.* Ex. 3.) As permitted by the Superior Court, Plaintiff timely submitted a detailed reply to the respondent's response. (*Id.* Ex. 4.) After reviewing the parties' submissions, the Superior Court appointed counsel for Plaintiff and issued an order to show cause to the respondent. (*Id.* Ex. 5.)

Despite disputing each of Plaintiff's allegations in the petition, counsel for both the respondent and Plaintiff agreed that the respondent would "review [Plaintiff's] entire central files to conduct a thorough review of [Plaintiff's] status as an active affiliate of the EME and to provide [Plaintiff] with an opportunity to address each item that may be considered by the LEIU [*i.e.* Law Enforcement and Investigations Unit] for validation before the materials were

forwarded to the LEIU." (RJN Ex. 6, at Ex. E, Hawkes Decl. ¶ 20.) This review occurred in June 2006. While disputing whether this new process provided Plaintiff with the requisite due process, Plaintiff's counsel recognized that Plaintiff was aware of the charges leveled against him, was provided with the opportunity to contest the evidence utilized against him, and was provided with an adequate disclosure of the confidential information utilized in the re-validation process. (*Id.* Ex. 7, at ¶¶ 7, 16, 18.)

In addition to these due process issues, a dispute arose regarding the number of source items required for re-validation under the terms of the *Castillo v. Alameida,* No. 94-2849 MJJ (N.D. Cal.) settlement. The Superior Court requested the parties submit additional briefing on this topic. (*Id.* Ex. 8.) In its order, the Superior Court noted that the respondent "has initiated a new re-validation process that is not yet complete . . ., [and] it would appear that giving [Plaintiff] the process that was initially deprived may cure any defects in the previous re-validation process." (*Id.*, at 2:12-15.) After receiving the requested supplemental briefing, the Superior Court ordered the "case dismissed, petition dismissed/discharged, [and] OSC dismissed." (*Id.* Ex. 13.) Plaintiff did not appeal this order. (*Id.* Ex. 14.)

B. The 2006 Prison Gang Re-Validation.

As referenced above, Plaintiff received another prison gang re-validation process in June 2006. Specifically, Plaintiff alleges that Defendant Hawkes assembled over twenty-seven source items indicating Plaintiff was an active associate of the EME. (Compl. ¶ 28.) Additionally, Plaintiff alleges that Defendants Williams, Fischer, and Ruff "made the decision to validate Plaintiff as an active associate of a prison gang based on sixteen of the twenty-seven source items presented in the validation package." (*Id.* ¶ 29.)

1. Inmate Appeal No. PBSP 06-01842.

Again Plaintiff apparently believed that this 2006 gang re-validation violated his due process rights. On July 30, 2006, Plaintiff submitted inmate appeal no. PBSP 06-01842. (Compl. Ex. H.) In this inmate appeal, Plaintiff grieved that the source items utilized to re-validate him as an associate of a prison gang did not comport with the required *Castillo* criteria. (*Id.*)

This inmate appeal bypassed both the informal and first level of review. At the second level, Plaintiff's inmate appeal was denied. (*Id.*) Plaintiff continued to prosecute this inmate appeal to the Director's Level. (*Id.*) At the Director's Level, Plaintiff's inmate appeal was denied. (*Id.*)

2. Superior Court Case No. HCPB 06-5235.

On December 13, 2006, Plaintiff filed another petition for the writ of habeas corpus in the Superior Court. (RJN Ex. 15.) Plaintiff's second petition was assigned the case no. HCPB 06-5235. (*Id.*) Plaintiff's second petition recited in detail the factual background surrounding both the 2004 and 2006 gang re-validations. (*Id.*) In the petition, Plaintiff alleged that the 2006 re-validation did not comport with the relevant *Castillo* criteria. (*Id.*, at 7-8.)

The Superior Court requested the parties submit informal responses to Plaintiff's second petition. (*Id.* Ex. 16.) The respondent again submitted a detailed response denying the allegations in Plaintiff's second petition and requested the Superior Court deny Plaintiff's second petition. (*Id.* Ex. 17.) As permitted by the Superior Court, Plaintiff timely submitted a detailed reply to the respondent's response. (*Id.* Ex. 18.) After reviewing the parties' submissions, the Superior Court denied Plaintiff's second petition. (RJN Ex. 19; Compl. Ex. K.)

In its decision, the Superior Court evaluated Plaintiff's 2006 prison gang re-validation and even conducted an *in camera* review of the confidential documents utilized in Plaintiff's gang re-validation process. (RJN Ex. 19, at 3:3.) In this process, the Court found that Plaintiff was provided with "detailed 1030 confidential disclosure forms." (*Id.*, at 2:8.) Moreover, the Court found insufficient as a matter of law Plaintiff's argument that several of the sources used against him were self-serving. (*Id.*, at 2:8-14.) In fact, the Court evaluated the relevant *Castillo* criteria and found that "only one, not three, source item is required to return [Plaintiff] to active gang status and mandatory SHU commitment." (*Id.*, at 3:1-2.) Consequently, the Superior Court denied Plaintiff's second petition. Plaintiff again did not appeal this order. (*Id.* Ex. 20.)

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ARGUMENT

Defendants' motion to dismiss is based on (1) Rule 12(b)(6) due to Plaintiff's failure to state a claim for which relief can be granted, (2) the unenumerated portion of Rule 12(b) due to Plaintiff's failure to exhaust his administrative remedies with respect to his retaliation claim, and (3) qualified immunity due to the Superior Court's multiple rulings regarding the claims and issues alleged by Plaintiff in the Complaint.

I. THE COMPLAINT FAILS TO STATE A CLAIM UNDER RULE 12(b)(6).

Dismissal is appropriate when a complaint fails to state a claim upon which relief can be granted. *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1964-65 (2007); Fed R. Civ. P. 12(b)(6). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is proper where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). Moreover, it is appropriate for the Court to "take judicial notice of matters of public record outside the pleadings" and consider them for purposes of the motion to dismiss. *MGIC Indem. Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir. 1986).

Here, the Complaint fails to state a claim not barred by the doctrines of res judicata and collateral estoppel, fails to establish supervisor liability under 42 U.S.C. § 1983, and fails to demonstrate a constitutional right to an administrative-appeals process. For these reasons, Defendants' motion to dismiss should be granted.

A. The Complaint Is Barred by the Doctrines of Res Judicata and Collateral Estoppel Because Plaintiff Litigated All the Alleged Claims and Issues Contained in the Complaint Before the Superior Court.

As a general rule, federal courts must accord preclusive effect to issues decided by state courts. *See* 28 U.S.C. § 1738. The rationale for this principle is that "res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. Murray,* 449 U.S. 90, 95-96 (1980).

While habeas petitions are considered an extraordinary remedy, the doctrines of res judicata and collateral estoppel apply with full force and effect. The Ninth Circuit could not state with greater clarity that:

> There is no reason to conclude that a decision by a state habeas court, after a full and fair hearing, should be considered to have any less weight or credibility than a state court decision in a direct action. If issues are presented to a habeas court, it can be assumed to apply the appropriate constitutional standards and reach a decision just as would be done on direct review.
> . . . .
> In sum, we hold that because of the nature of a state habeas proceeding, a decision actually rendered should preclude an identical issue from being relitigated in a subsequent [Section] 1983 action if the state habeas court afforded a full and fair opportunity for the issue to be heard and determined under federal standards.

Silverton v. Dep't of Treasury, 644 F.2d 1341, 1346-47 (9th Cir. 1981). Consequently, this Court must accord the Superior Court's decisions regarding both of Plaintiff's habeas petitions the same preclusive effect that these decisions would be afforded in a California court. *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.,* 750 F.2d 731, 736 (9th Cir. 1984).

Here, Plaintiff, on no less than two occasions, petitioned the Superior Court for redress for the claims that are now reiterated yet again in the Complaint. After substantial briefing and argument, the Superior Court dismissed Plaintiff's first petition and denied Plaintiff's second petition. (RJN Ex. 13, 19.) Moreover, during the litigation involving Plaintiff's first petition, a settlement was reached between the parties, which the Superior Court recognized would "cure any defects in the previous re-validation process." (*Id.* Ex. 8, at 2:12-15.) Under these facts and applying California law, a California court would find that the Complaint is barred by the doctrines of res judicata and collateral estoppel. Therefore, Defendants respectfully request that the Complaint be dismissed in its entirety.

1. The Complaint is Barred by Res Judiciata.

Res judicata, commonly known as claim preclusion, prohibits a second lawsuit involving the (1) same controversy (2) between the same parties or their privies (3) so long as the prior lawsuit was a final judgment on the merits. *Mycogen Corp. v. Monsanto Co.,* 28 Cal. 4th 888, 896 (2002). Res judicata is a powerful doctrine because it bars all issues that were litigated or

that might have been litigated in the first proceeding. *Mycogen Corp.*, 28 Cal. 4th at 896; *Olwell v. Hopkins,* 28 Cal. 2d 147, 152 (1946). Here, the decisions rendered by the Superior Court with respect to Plaintiff's first and second petitions satisfy the necessary requirements and operate as res judicata to bar the Complaint.

i. Plaintiff's First Petition, Second Petition, and the Complaint All Involve the Same Controversy Under California Law.

Under California law, the primary right theory is utilized to determine whether the "same controversy" is being precluded for res judicata purposes. *Mycogen Corp.*, 28 Cal. 4th at 904; *Los Angeles Branch NAACP,* 750 F.2d at 737. Under the primary right theory "a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." *Crowley v. Katleman,* 8 Cal. 4th 666, 681 (1994). Consequently, "a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief." *Slater v. Blackwood,* 15 Cal. 3d 791, 795 (1975).

The primary right asserted in Plaintiff's two petitions and the Complaint is the same, the violation of Plaintiff's federal civil rights. Plaintiff does not allege anything substantively new or different in the Complaint, than what he already raised before the Superior Court in his two petitions. The specific legal theories utilized by Plaintiff in these various actions are immaterial because Plaintiff has not suffered injury to more than one interest. Consequently, res judicata bars the Complaint because it seeks to revisit the same controversy already presented to the Superior Court.

ii. The Parties Involved in Plaintiff's First Petition, Second Petition, and the Complaint Are Substantially Identical Under California Law.

While the Complaint names eleven defendants not mentioned in the petitions, this fact does not defeat the application of res judicata. For the purposes of res judicata, privity is determined based on a "whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion." *People v. Drinkhouse,* 4 Cal. App. 3d 931, 937 (1970); *see also Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n,* 60 Cal. App. 4th

1053, 1069 (1998). Here, most of the new defendants are referenced in Plaintiff's two habeas petitions. In fact, both of Plaintiff's habeas petitions were brought against the warden at PBSP and Defendant Kirkland was named as the sole respondent in Plaintiff's first petition.

It is simply not dispositive that Plaintiff added eleven more defendants to the Complaint. These new defendants added nothing to the claims asserted in Plaintiff's various habeas petitions. *See Eulenberg v. Torley's, Inc.,* 56 Cal. App. 2d 653, 657 (1943). Consequently, the parties between Plaintiff's various habeas petitions and the Complaint should be considered substantially identical and res judicata should bar the Complaint.

iii. The Superior Court's Decisions on Plaintiff's First and Second Petitions are Considered Final and on the Merits Under California Law.

In order for res judicata to bar Plaintiff's Complaint, the Superior Court's decisions with respect to Plaintiff's petitions must be considered final and on the merits. This requirement is imposed to give stability to judgments after the parties have been given a fair opportunity to litigate their claims and defenses. *Datta v. Staab,* 173 Cal. App. 2d 613, 620 (1959). Here, there can be no dispute that the Superior Court's decision denying Plaintiff's second petition is considered a final judgment on the merits. The Superior Court reviewed Plaintiff's second petition, requested the parties submit briefing, and after reviewing this briefing entered an order denying Plaintiff the requested relief. Plaintiff did not appeal this order and the judgment became final as a matter of law.

The Superior Court's decision dismissing Plaintiff's first petition is a closer question. Ordinarily, a judgment of dismissal is not considered a final judgment on the merits. *Olwell,* 28 Cal. 2d at 149. But the mere dismissal of an action is not dispositive because sometimes "a dismissal may follow an actual determination on the merits." *Id.* To make this determination the Court should consider the "entire 'judgment' together with the pleadings and the findings." *Id.* The Superior Court's action dismissing Plaintiff's first petition should be considered final and on the merits because the petition was "dismissed after the department (*i.e.* CDCR) agreed to undertake anew proceedings against [Plaintiff] to establish his 'active' status and return him to SHU." (RJN Ex. 19, at 1:26-28.) In this proceeding before the Superior Court, Plaintiff was

represented by counsel and the Superior Court recognized that the parties' agreement to provide Plaintiff with a new re-validation process would "cure any defects in the previous re-validation process." (*Id.* Ex. 8, at 2:12-15.) At the time the Superior Court dismissed Plaintiff's first petition, there was no additional relief the Superior Court could have granted Plaintiff. Consequently, in this case the "dismissal occurred after an not in lieu of a determination on the merits." *Olwell,* 28 Cal. 2d at 151.

2. The Complaint is Barred by Collateral Estoppel.

Collateral estoppel, commonly known as issue preclusion, prohibits the re-litigation of issues decided in a prior proceeding so long as: (1) the issue is identical to the one decided in a prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was necessarily decided in the prior proceeding; (4) the decision in the prior proceeding was final and on the merits; and (5) the party against whom preclusion is sought is same or in privity with the party from the prior proceeding. *Lucido v. Superior Court,* 51 Cal. 3d 335, 341 (1990). Here, the decisions rendered by the Superior Court with respect to Plaintiff's first and second petitions satisfy the necessary requirements and operate as collateral estoppel to bar the Complaint. For the above referenced reasons, the claims in the Complaint are barred by the doctrine of res judicata.

i. The Issues in the First Petition, Second Petition, and Complaint are Identical Under California Law.

Under California law, the identical issue requirement "addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." *Lucido,* 51 Cal. 3d at 342. Without belaboring the point, the issues confronted in Plaintiff's petitions and the Complaint are identical. The petitions and the Complaint reference the same incidents, involving the same Defendants. Consequently, for the purposes of collateral estoppel, the issues in Plaintiff's petitions are identical to the issues in the Complaint.

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ii. The Issues in the Complaint Were Actually Litigated Before the Superior Court.

In addition to being identical, the issues raised in the Complaint were actually litigated in the Superior Court. Under California law, an issue is actually litigated "when it is *properly raised* by the pleadings or otherwise and is submitted for determination . . . ." *People v. Sims,* 32 Cal. 3d 468, 484 (1982) (emphasis in original). To satisfy this prong, it is not necessary that an exhaustive adversarial hearing be held. *Barker v. Hull,* 191 Cal. App. 3d 221, 226 (1987). Moreover, there is no requirement than even an evidentiary hearing be held. *Clement v. Cal. Dep't of Corrs.,* 220 F. Supp. 2d 1098, 1108 (2002).

Here, Plaintiff raised his various due process issues to the Superior Court. (RJN Ex. 1, at 3-5, 8-9, 14-15; Ex. 15, at 7-8.) Additionally, Plaintiff repeatedly raised the factual basis regarding his retaliation claim. (*Id.* Ex. 1, at 7; Ex. 4, at 8; Ex. 7, at 5; Ex. 15, at 4, Ex. F.) Therefore, as the issues contained in the Complaint were presented to the Superior Court for determination, these issues were actually litigated for the purposes of collateral estoppel.

iii. The Issues in the Complaint Were Necessarily Decided by the Superior Court.

To satisfy this standard, Defendants must demonstrate that the issue sought to be precluded was not "entirely unnecessary" to the judgment in the prior proceeding. *Lucido,* 51 Cal.3d at 342. It is readily apparent that the Superior Court necessarily decided Plaintiff's due process issue when it dismissed and denied Plaintiff's habeas petitions. By dismissing and denying the habeas petitions, the Superior Court necessarily decided that Plaintiff's due process rights were not violated because Plaintiff was not entitled to additional due process. Moreover, as Plaintiff bundled his retaliation issue with his due process issue in the two habeas petitions, the retaliation issue should also be considered necessarily decided by the Superior Court as well.

iv. The Superior Court's Decisions Were Final and on the Merits.

As previously discussed, the Superior Court's decisions were final and on the merits for purposes of California law.

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v. Plaintiff Was a Party to the Superior Court Actions.

Finally, Defendants are able to demonstrate the necessary privity because Plaintiff was the petitioner in both Superior Court actions. For the above referenced reasons, the issues addressed in the Complaint are barred by the doctrine of collateral estoppel.

B. Plaintiff's Claims Against Defendants Woodford, Alameida, Chrones, Kirkland, and Hunter Fail as a Matter of Law Because, Absent Certain Facts, Supervisors Are Not Liable Under Section 1983.

To state a claim for a constitutional violation, Plaintiff must set forth facts proximately connecting the individual defendants to the loss Plaintiff claims to have suffered. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). Vague and conclusory allegations concerning the involvement of personnel in civil-rights violations are insufficient to survive a motion to dismiss. *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Plaintiff must establish the personal involvement of each defendant in the alleged constitutional deprivation or at least a "causal connection" between each defendant's wrongful conduct and the deprivation at issue. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1978).

Here, the Complaint apparently seeks to impose liability on Defendants Woodford, Alameida, Chrones, Kirkland, and Hunter through either a *respondeat superior* or vicarious liability theory. (Compl. ¶¶ 1-3, 6, 8, 58-61.) The law is clear, however, that neither of these theories are available in a 42 U.S.C. § 1983 action. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 692 (1978); *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). A supervisor is "only liable for constitutional violations of his subordinates, if the supervisor participated in or directed the violations or knew of the violations and failed to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992). The Complaint makes no allegation that Defendants Woodford, Alameida, Chrones, Kirkland, or Hunter engaged in such conduct. (Compl. ¶¶ 1-3, 6, 8, 58-61.) Therefore, Plaintiff's claims against Defendants Woodford, Alameida, Chrones, Kirkland, and Hunter should be dismissed.

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C. Plaintiff's Claims Against Grannis, Kirkland, and Hunter Fail as a Matter of Law Because Plaintiff Does Not Have a Constitutional Right to an Administrative-Appeals Process.

Inmates do not have a constitutional right to submit prisoner administrative appeals or inmate grievances. *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). A prison grievance procedure is a procedural right only and does not confer any substantive rights upon inmates. *Buckley v. Barlow,* 997 F.2d 494, 495 (8th Cir. 1993). Consequently, a prison official's involvement and actions in reviewing and/or investigating a prisoner's administrative appeal cannot serve as the basis for liability under a Section 1983 action. *Buckley,* 997 F.2d at 495.

Here, Plaintiff alleges that Defendants Grannis, Kirkland, and Hunter denied his inmate appeal nos. CAL 04-00545 and PBSP 06-01842. (Compl. ¶¶ 6-8.) Plaintiff does not allege that Defendants Grannis, Kirkland, or Hunter did anything other than review and/or investigate Plaintiff's various inmate appeals. Where there are no facts that show the violation of a federally protected right, a party is entitled to prevail as a matter of law. *See Baker v. McCollan*, 443 U.S. 137, 146 (1979). Consequently, in the absence of any evidence of wrongdoing, Defendants Grannis, Kirkland, and Hunter may not be held liable for their actions taken as part of the inmate appeals process and must be dismissed under Federal Rule of Civil Procedure 12(b)(6).

II. PLAINTIFF'S CLAIM FOR RETALIATION MUST BE DISMISSED BECAUSE HE FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

An inmate's failure to exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA) is a matter in abatement properly raised in an unenumerated 12(b) motion. Fed. R. Civ. P. 12(b); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). "In deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact." *Wyatt*, 315 F.3d at 1119-20. If the Court determines that the inmate has not exhausted his administrative remedies, the case must be dismissed without prejudice. *Id.*

Here, Plaintiff failed to exhaust his administrative remedies with respect to his claim for retaliation. Consequently, to the extent the Court finds Plaintiff's retaliation claim is not barred

by the doctrines of res judicata and collateral estoppel, this claim should be dismissed without prejudice because Plaintiff failed to exhaust his administrative remedies.

A. The PLRA Requires Plaintiff to Exhaust Administrative Remedies Before Filing Suit.

The PLRA mandates that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement applies even where the relief sought cannot be granted by the administrative process. *Booth v. Churner*, 532 U.S. 731, 734 (2001). Exhaustion must occur before filing suit; exhaustion "subsequent to filing the suit will not suffice." *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002); *see also Vaden v. Summerhill*, 449 F.3d 1047 (9th Cir. 2006). Exhaustion is mandatory and is not left to the discretion of the court. *Booth*, 532 U.S. at 739. When there is no pre-suit exhaustion, a court must dismiss the complaint without prejudice. *McKinney*, 311 F.3d at 1200-01.

The State of California provides inmates in its custody with an extensive administrative-appeals process to grieve any issues that the inmates "can demonstrate as having an adverse effect upon their welfare." Cal. Code Regs. tit. 15, §§ 3084.1(a), 3084.5. To submit an administrative grievance, the inmate "shall use a CDC Form 602 . . . , Inmate/Parolee Appeal Form, to describe the problem and action requested." *Id.* § 3084.2(a). The California administrative-grievance process provides an inmate with four levels of review: (1) informal resolution, (2) first-formal-level review (First Level), (3) second-formal-level review by the institution head or designee (Second Level), and (4) third-formal-level review by a designated representative of the Director of the California Department of Corrections and Rehabilitation (CDCR) under supervision of the chief of the Inmate Appeals Branch (Director's Level). *See id.*, § 3084.5.

To satisfy the PLRA's exhaustion requirement, an inmate must pursue an inmate appeal through the lower levels of review and receive a final decision from the Director's Level. *See id.*, § 3084.5; *Woodford v. Ngo*, 548 U.S. 81 (2006). An inmate cannot satisfy the PLRA's exhaustion requirement by submitting an untimely or otherwise procedurally defective inmate

appeal. *Woodford*, 548 U.S. at 94-95. For both non-constitutional and constitutionally based claims, proper exhaustion of administrative remedies is necessary. *Id.* at 91 n.2.

Proper exhaustion "means using all the steps the agency holds out, and doing so properly (so the agency addresses the issues on the merits)." *Id.* at 90. The PLRA's exhaustion requirement was designed to provide CDCR a full and fair opportunity to adjudicate an inmate's claims before those claims become the subject of a lawsuit. *Id.* at 94. Requiring compliance with CDCR's deadlines and other critical procedures ensures that the PLRA's exhaustion requirement successfully realizes its function. *Id.* "[C]ourts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*." *Id.* at 90 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)) (internal quotations omitted and emphasis in original).

B. Plaintiff Failed to Properly Exhaust His Administrative Remedies on His Retaliation Claim.

To exhaust his administrative remedies with respect to his retaliation claim, Plaintiff needed to submit an inmate appeal addressing this claim, pursue that inmate appeal through the lower levels of review, and receive a decision on that inmate appeal from the Director's Level. *See* Cal. Code Regs. tit. 15, § 3084.5; *Woodford,* 548 U.S. at 85-86. Plaintiff, however, never submitted an inmate appeal regarding his retaliation claim. (Compl. Ex. F, H; Grannis Decl. ¶ 4.)

In the inmate appeals referenced in the Complaint, Plaintiff grieves about the due process violations that he allegedly suffered. (Compl. Ex. F, H.) While Plaintiff refers to Defendant Garcilazo in inmate appeal no. CAL 04-00545, Plaintiff does not allege that Defendant Garcilazo or any other Defendant ordered Plaintiff's placement in the SHU in retaliation for Plaintiff allegedly refusing to serve as an informant. (*Id.* Ex. F.) Moreover, Defendants have not located any inmate appeals that Plaintiff prosecuted to the Director's Level that made such an allegation. (Grannis Decl. ¶ 4.) Instead it appears that the only time Plaintiff asserted this retaliation claim was in his petitions to the Superior Court and in the Complaint. As such, Plaintiff failed to exhaust his administrative remedies in accordance with 42 U.S.C. § 1997e(a).

Plaintiff did not follow critical procedures of the inmate-grievance system and, in doing so, deprived CDCR of a full and fair opportunity to adjudicate his retaliation claim before this claim was brought to this Court. *See Woodford,* 548 U.S. at 94. As the Supreme Court held in *Woodford*, given the "informality and relative simplicity of prison grievance systems like California's," requiring proper exhaustion provides inmates with a meaningful opportunity to raise meritorious claims while allowing CDCR to maintain order in its institutions. *Id.* at 103. Because Plaintiff failed to properly exhaust his administrative remedies, the Court should dismiss Plaintiff's claim for retaliation. *McKinney*, 311 F.3d at 1200.

III. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

Government officials are entitled to qualified immunity from liability for civil damages if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The rule of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 495 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Qualified immunity ensures that officials are on notice that their conduct is unlawful before they are subjected to suit. *Saucier v. Katz*, 533 U.S. 194, 205–06 (2001). It therefore prevents officials from being distracted from their governmental duties or inhibited from taking necessary discretionary action. *Harlow*, 457 U.S. at 816. And in context of prisons, the doctrine allows officials to utilize their expertise—based on years of observation and practice—to maintain order without fear of liability for doing what seemed "reasonable" at the time. *See Jeffers v. Gomez*, 267 F.3d 895, 917 (9th Cir. 2001). Consequently, an official is entitled to qualified immunity unless: (1) the facts show a constitutional violation, and (2) it was clearly established, at the time, that the conduct was unconstitutional. *Saucier,* 533 U.S. at 201.

"If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense." *Saucier,* 533 U.S. at 201. Qualified immunity is a question for the Court, even if it requires a factual determination as to whether the defendant acted reasonably under the circumstances. *Behrens v. Pelletier,* 516 U.S. 299, 313 (1996). "Therefore,

regardless of whether the constitutional violation occurred, the [official] should prevail if the right asserted by the plaintiff was not 'clearly established' or the [official] could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991). Here, Defendants are entitled to qualified immunity because Plaintiff cannot satisfy either part of the *Saucier* test.

As discussed at length above, the Superior Court on no less than two occasions ruled that Plaintiff had not suffered any constitutional violation by his placement in the SHU. Therefore, the facts do not show Defendants committed a constitutional violation. Moreover, even if the facts did demonstrate a constitutional violation, in light of the Superior Court's decisions on Plaintiff's petitions, Defendants acted reasonably. Therefore, Defendants are entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, Defendants respectfully request their motion to dismiss be granted and that the Court find they are entitled to qualified immunity.

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Respectfully submitted,

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